IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

PRIME AID PHARMACY CORP., Plaintiff, v. EXPRESS SCRIPTS, INC., Defendant.	:	Cause No.: 4:16-cv-01237-CEJ

PLAINTIFF'S MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff Prime Aid Pharmacy Corp. ("Prime Aid" or "Plaintiff"), by and through its attorneys, Duane Morris LLP and Greensfelder, Hemker & Gale, P.C., hereby files the instant Memorandum of Law in Opposition to Defendant Express Scripts, Inc.'s ("Express Scripts" or "Defendant") Motion to Dismiss.

I. INTRODUCTION

This matter arises from Express Scripts' wrongful termination of the Provider Agreement between Prime Aid and Express Scripts, dated July 25, 2011 (as amended, the "Agreement"), and Express Scripts' scheme to defraud Prime Aid following that termination. In a transparent bid to delay answering Prime Aid's First Amended Complaint (Doc. No. 33), Express Scripts has filed a meritless partial Motion to Dismiss Prime Aid's claims for: (1) fraudulent misrepresentation, (2) violation of the Missouri Prompt Pay Act, and (3) equitable accounting. (Doc. No. 45).[1]

Prime Aid has more than adequately pled each of the three claims Express Scripts seeks to dismiss.

First, Prime Aid's averments supporting its fraudulent misrepresentation claim (Count I) more than satisfy Federal Rule of Civil Procedure 9(b). That Rule requires a plaintiff simply to provide notice of the "who, what, where, and when" of a fraudulent statement. Here, Prime Aid has clearly met these requirements. Accordingly, Express Scripts' Motion must be denied.

Second, Prime Aid has standing to maintain a claim under the Missouri Prompt Pay Act ("MPPA") (Count IV). The MPPA requires third-party contractors, such as Express Scripts, to reimburse claims, or provide certain information, within a set timeframe. The text of the statute makes clear that Prime Aid is a qualified claimant. It is a corporation asserting a right to payment against a health carrier. Express Scripts' assertion notwithstanding, the statutory text does not limit the definition of claimant to Missouri-based entities. Moreover, as a duly licensed Missouri pharmacy servicing Missouri residents, Prime Aid has standing under the MPPA.

Third, Prime Aid has adequately pled its claim for an equitable accounting (Count VII). Prime Aid has pled the fiduciary duty owed by Express Scripts as required by Missouri law. Prime Aid was entirely subservient to Express Scripts by virtue of the manner in which Express Scripts dominated the parties' relationship. Prime Aid has averred, in substantial detail, that Express Scripts maintained sole custody over Prime Aid's funds due to Express Scripts' exclusive control over all aspects of the claims reimbursement process. Reimbursement due

[1] Express Scripts concedes that Prime Aid has properly pled claims for: (1) breach of contract (Count II); (2) breach of the implied covenant of good faith and fair dealing (Count III); (3) unjust enrichment (Count V); and (4) promissory estoppel (Count VI).

Prime Aid was under Express Scripts' sole control, creating a fiduciary duty under Missouri law. Accordingly, Prime Aid has pled the claim more than adequately. It should not be dismissed.

II. FACTUAL BACKGROUND

Prime Aid is a corporation and duly licensed pharmacy that has provided superior retail and specialty pharmacy services to thousands of patients since 2006.[2] (Compl. ¶¶ 5-7, 18-20).[3] Express Scripts is a pharmacy benefit manager that maintains a network of pharmacies to fill prescriptions on behalf of insureds around the country. (Compl. ¶ 4). Prime Aid entered Express Scripts' network in 2006, and Prime Aid and Express Scripts executed the Provider Agreement ("the Agreement") at issue in this case in 2011. (Compl. ¶¶ 7, 25). Express Scripts wrongfully terminated the Agreement in August 2014. (Compl. ¶¶ 35-36).[4]

The relationship between Prime Aid and Express Scripts was completely dependent upon the decision-making of Express Scripts. (*See* Compl. ¶¶ 4, 41-44, 135; Compl. Ex. A). Prime Aid submitted its high volume of claims to Express Scripts seeking reimbursement, subject to an intricately detailed set of guidelines. (*See* Compl. ¶ 7; Compl. Ex. A). Moreover, Express Scripts retained sole discretion over approval of such claims. It remained in sole possession of records confirming the reimbursements approved and claims denied. (Compl. ¶¶ 135-36). The effect of this relationship put Prime Aid, and the thousands of patients it serviced, subject to the whims of Express Scripts. (Compl. ¶ 137).

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[2] In its Motion to Dismiss, Express Scripts asserts that "the New Jersey State Board of Pharmacy had found that Prime Aid violated a series of regulatory provisions." (Def.'s Mem. Supp. Mot. Dismiss at 3). This allegation is demonstrably false. The Notice from the Board of Pharmacy offered Prime Aid "an opportunity to settle this matter and thereby avoid the initiation for disciplinary proceedings." (Compl. Ex. H) (emphasis added). Prime Aid paid a mere $750 to the Board, and was never the subject of Board discipline. (Compl. ¶¶ 46-47). Moreover, Prime Aid notes the hypocrisy of Express Scripts' position. As pled by Prime Aid, Express Scripts and its subsidiaries have paid *hundreds of millions of dollars* to settle various federal civil and criminal allegations of malfeasance—yet, never once, have the network rights of these entities, namely Accredo (its affiliated pharmacy), been modified, suspended, or terminated. (Compl. ¶¶ 51-52).

[3] All references to Prime Aid's First Amended Complaint are abbreviated as "Compl." (Doc. No. 33).

[4] Prime Aid's other claims (breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and promissory estoppel)—which Express Scripts has not moved to dismiss—more directly address the wrongful termination of the Provider Agreement.

After wrongly terminating the Agreement, Express Scripts engaged in a pattern of fraudulent conduct designed to undermine Prime Aid's position as: (1) a leader in the specialty pharmacy marketplace; and (2) as a competitor of Express Script's own pharmacy subsidiary, Accredo.[5] (Compl. ¶¶ 54-70). Express Scripts began systematically poaching Prime Aid's customers immediately following the wrongful termination of the Agreement. (Compl. ¶¶ 56-58). It did so "with full knowledge of the extreme negative impact the elimination of [Prime Aid's former customer's] revenue would have upon Prime Aid's operations." (Compl. ¶ 56).

Express Scripts also sought to deny Prime Aid operating cash. In a September 12, 2014 letter, Express Scripts' attorney, Sarah Hellman, Esq. of Husch Blackwell LLP, falsely represented to Prime Aid that "there are no additional monies being withheld by Express Scripts." (Compl. ¶ 60; Compl. Ex. I) (emphasis added). Yet, more than a year later, on December 21, 2015, Express Scripts admitted that it had been withholding at least approximately $2 million in funds owed to Prime Aid; however, it had unilaterally decided to only return to Prime Aid less than half of those funds - $845,002.04. (Compl. ¶¶ 65-66; Compl. Ex. J). Express Scripts deigned not to explain its delay nor its withholding of close to two million dollars after falsely representing that its accounting revealed no further monies owed for prescriptions filled

[5] As will be established in discovery, the fraudulent scheme by Express Scripts directed at Prime Aid is hardly an isolated incident. Also pending before this Court is the matter captioned *Trone Health Services, Inc. v. Express Scripts Holding Co.*, No. 4:16-cv-01250-RLW. In that matter, Express Scripts is also alleged to have engaged in scheme to eliminate specialty pharmacies by "slamming" (i.e., stealing patients of independent specialty pharmacies by refilling their customers' prescriptions unbeknownst to the patients, the patient's physician, and the patient's chosen pharmacy). Moreover, approximately one week ago, Express Scripts acknowledged in its publicly available 10-Q filing that its use of affiliates to steal patients from specialty pharmacies is currently the target of investigations by the Department of Justice, as well as the U.S. Attorneys' offices in New York and Massachusetts. The Court is permitted to take judicial notice of this fact. *See Greenman v. Jessen*, 787 F.3d 882 (8th Cir. 2015) (noting that when ruling on a Rule 12(b)(6) motion to dismiss, a court may consider "some materials that are part of the public record or do not contradict the complaint").

by Prime Aid for Express Scripts' insureds. (Compl. ¶¶ 66-68). As a result of Express Script's misrepresentations, and Prime Aid's reliance thereon, Prime Aid was forced to terminate critical staff and cut back service to physically compromised patients, resulting in substantial damages. (Compl. ¶ 64, 70).

Aside from withholding Prime Aid's funds, Express Scripts also failed to pay, deny, or otherwise provide status updates on more than one-hundred claims submitted by Prime Aid. (Compl. ¶¶ 100-113). The Missouri Prompt Pay Act ("MPPA") imposes a series of legal deadlines on the payment of claims by a health carrier and/or third-party contractors. (Compl. ¶ 101). Specifically, it requires a health carrier to send, within thirty days of receiving a claim, an electronic or facsimile notice of the status of the claim that advises whether the claim is "clean" or requires additional information. (Compl. ¶ 101). If a claim is "clean," then the health carrier or third-party contractor is required to pay the claim, or state grounds for its denial, within that thirty day window. (Compl. ¶ 101). If the health carrier fails to make payment within forty-five days of receiving the claim, financial penalties attach. Here, Prime Aid submitted approximately 104 "clean claims" to Express Scripts, some as far back as January 7, 2013, and none later than August 25, 2014 (but in all cases, older than forty-five days), that were returned to Prime Aid in the December 21, 2015 letter without any additional information, or payment. (Compl. Ex. J).

III. STANDARD OF REVIEW

The Federal Rules of Civil Procedure require that a complaint contain "a short and plain statement that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A pleading satisfies this requirement where it provides "fair notice of the plaintiff's claim and grounds for relief." *Smith v. St. Bernards Reg'l Med. Ctr.*, 19 F.3d 1254, 1255 (8th Cir. 1994). "The factual allegations of a complaint are assumed true and construed in favor of the plaintiff, 'even if it strikes a savvy judge that actual proof of those facts is improbable.'" *Williams v. World Omni Financial Corp.*, No. 4:10-cv-285 (CEJ), 2011 WL 1585018 at *1 (E.D. Mo. April 26, 2011) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). This requires a court to "accept the allegations of the complaint as true." *Coons v. Mineta*, 410 F.3d 1036, 1039 (8th Cir. 2005); *see also Taylor v. Hull*, No. 4:13-cv-1065-CEJ, 2014 WL 562739 at *1 (E.D. Mo. Feb. 13, 2014). A court may not grant a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) where a complaint contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *McDonough v. Anoka County*, 799 F.3d 931, 945 (8th Cir. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A complaint qualifies for this protection where it raises "a right to relief above the speculative level." *Williams*, 2011 WL 15851018 at * 1 (quoting *Twombly*, 550 U.S. at 555).

IV. ARGUMENT

A. Prime Aid Has Properly Pled Express Scripts' Knowledge Of The Falsity Of Its Misrepresentations, And Prime Aid's Justifiable Reliance Thereon.

In its Memorandum in Support of its Motion to Dismiss, Express Scripts concedes that Prime Aid has properly pled nearly all of the elements of a fraudulent misrepresentation claim. (Def.'s Mem. Supp. Mot. Dismiss at 4). Express Scripts asserts, however, that Prime Aid has failed to properly plead: (1) Express Scripts' knowledge that its statements were false, or its ignorance of the truth of those statements; and (2) Prime Aid's justifiable reliance on Express Scripts' statements. (Def.'s Mem. Supp. Mot. Dismiss at 4-6). Prime Aid has properly pled both knowledge and justifiable reliance, and Express Scripts' arguments to the contrary are without merit.

1. Prime Aid Has More Than Adequately Pled Express Scripts' Knowledge Of The Falsity Of Its September 12, 2014 Representation, And Express Scripts' Ignorance As To Its Truth.

Federal Rule of Civil Procedure 9(b) requires parties alleging fraud to "state with particularity the circumstances constituting fraud or mistake." Eighth Circuit precedent defines "circumstances" to include "such matters as the time, place and contents of the false representations, as well as the identity of the person making the representation and what was obtained or given up thereby." *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 920 (8th Cir. 2001) (quoting *Bennett v. Berg*, 685 F.2d 1053, 1063 (8th Cir. 1982)). However, this requirement must be interpreted "in harmony with the principles of notice pleading" and "simply necessitates a higher degree of notice, enabling the defendant to respond specifically." *Id.*

This Court, and other courts in this District, have repeatedly held that a plaintiff satisfies its obligation to plead fraud with particularity pursuant to Rule 9(b) where it alleges "the who, what, when, where, and how of the alleged fraudulent misrepresentation." *Butano v. Wells Fargo, N.A.*, No: 4:13-cv-1652-HEA, 2014 WL 3384733 at * 5 (E.D. Mo. July 10, 2014); *see also Blankenship v. Medtronic, Inc.*, No. 4:13-cv-1087 (CEJ), 2014 WL 3818485 at * 3-4 (E.D. Mo. Aug. 4, 2014) (denying a motion to dismiss for failing to satisfy Rule 9(b) where plaintiff alleged "detailed and numerous allegations" of defendant's "campaign to fraudulently misrepresent the health risks" of its products); *Storkson v. J.P. Morgan Chase Bank, N.A.*, No: 4:13-cv-00350-AGF, 2013 WL 3422028 at * 2 (E.D. Mo. July 8, 2013); *Foam Supplies, Inc. v. The Dow Chemical Co.*, No. 4:05-cv-1772-CDP, 2006 WL 2225392 at * 14 (E.D. Mo. Aug. 2, 2006).

Prime Aid's Amended Complaint clearly accords with those in *Butano*, *Blankenship*, *Storkson*, and *Foam Supplies*. Like the complaints in those cases, Prime Aid has identified the misrepresentation at issue, as well as the "who, when, where, and how." Specifically, the Complaint states:

> Most noteworthy, after terminating the Provider Agreement with Prime Aid, Express Scripts, in a September 12, 2014 letter to Prime Aid's counsel, stated that "there are no additional monies being withheld by Express Scripts." *See* Exhibit I (emphasis added).

(Compl. ¶ 60). Exhibit I to the Complaint, referenced in Paragraph 60, answers any lingering questions regarding the particulars of the misrepresentation. That document, clearly identifies that it is a letter: (1) from Sarah C. Hellmann, a partner at the law firm Husch Blackwell LLP and counsel for Express Scripts; (2) dated September 12; and (3) addressed to Jonathan L. Swichar, a partner at the law firm Duane Morris LLP and counsel for Prime Aid. (Compl. Ex. I). Additionally, Prime Aid has clearly alleged its reliance on Ms. Hellman's misrepresentation:

> Prime Aid did, in fact, rely upon such misrepresentations. Under the false impression that it was not owed (and thus would not receive millions of dollars from Express Scripts), Prime Aid was forced to dramatically downsize its operations. Such downsizing included, but was not limited to, laying off critical staff, such as pharmacists, nurses, and salespersons. This downsizing proximately caused millions of dollars of additional damages to Prime Aid.

(Compl. ¶ 64). Therefore, Prime Aid has more than sufficiently pled the "whom, when, and where" of the misrepresentation at issue, and thus, like the complaints in *Butano, Blankenship*, *Storkson*, and *Foam Supplies*, the Motion to Dismiss should be denied.

To support its meritless position as to the deficiency of Prime Aid's pleading, Express Scripts relies on a distorted interpretation of a single case: *Laidlaw Waste Sys., Inc. v. Mallinkrodt, Inc.*, 925 F. Supp. 624, 634 (E.D. Mo. 1996). In that case, the District Court granted the defendant's motion to dismiss where the plaintiff only averred, generally and without any specifics, that the defendant had knowledge of the falsity of its representations. *Id.* at 635. As is evident from the specific detail contained in Paragraphs 60 and 64 of the Amended Complaint, as well as Exhibit I thereto, Prime Aid's Amended Complaint is totally distinguishable from the one in *Mallinkrodt.* Prime Aid's Amended Complaint does not merely parrot the elements of its cause of action. It provides sufficient notice to enable Express Scripts "to respond specifically." *Abels*, 259 F.3d at 920. It is now up to Express Scripts to justify its deliberately concealed withholding of funds.

Prime Aid's Complaint is sufficient as to the fraudulent misrepresentation claim. Express Scripts' Motion to Dismiss must be denied.

2. Express Scripts' Assertion That Prime Aid Failed To Adequately Plead Justifiable Reliance Lacks A Legal Basis.

Under Missouri law, justifiable reliance is a question of fact and not a matter of law. *See Van Booven v. Smull*, 938 S.W.2d 324, 328 (Mo. Ct. App. 1997) ("The right for a person to rely on a representation made is generally a question of fact.") (citing *Colgan v. Washington Realty Co.*, 879 S.2d 686, 690 (Mo. Ct. App. 1994)). "The concept of fraud liability based upon nondisclosure couches such reliance in terms of the availability of the information to the plaintiff and the plaintiff's diligence." *Id.* (quoting *Fairmont Foods Co. v. Skelly Oil Co.*, 616 S.W.2d 548, 550 (Mo. Ct. App. 1981)). Thus, where one party possesses information "not reasonably available" to the other party, there exists an actionable duty to disclose. *Keefhaver v. Kimbrell*, 58 S.W.3d 54, 59-60 (Mo. Ct. App. 2001) (holding that there was justifiable reliance where the parties "did not stand on an equal footing" and that representation concerned information that was "peculiarly within the knowledge" of the defendants).

Aside from the fact that Prime Aid's justified reliance is not currently ripe for decision, Prime Aid has more than adequately pled reliance and that it was entitled to rely on Ms. Hellmann's letter. (Compl. Ex. I). As noted in Prime Aid's Complaint, Express Scripts was in sole possession of records reflecting claims submitted by Prime Aid, amounts it remitted to Prime Aid, the amounts it has withheld from Prime Aid and the specific grounds relied upon by

Express Scripts when full amounts owed were not remitted. (Compl. ¶ 135-36). Given the complexity of the relationship, and the enormous number of claims submitted by Prime Aid, Express Scripts and Prime Aid—like the parties in *Keefhaver*—did not stand on an equal informational footing with one another. (Compl. ¶¶ 7, 135). Therefore, because only Express Scripts and its counsel possessed the information at issue, it was unquestionably reasonable for Prime Aid to rely on that representation.

In its Memorandum, Express Scripts cites *Sherwin-Williams Co. v. Novak's Collision Ctr.*, No. 4:12-cv-02148, 2013 WL 5500107 at *4 (E.D. Mo. Oct. 3, 2013) for the proposition that "Prime Aid's alleged reliance is unreasonable as a matter of law." (Mem. Supp. Mot. Dismiss at 5). That case is inapposite. The issue before the Court in *Sherwin-Williams* was whether the counter-claim plaintiff could justifiably rely upon a manager's statements without any investigation, where there existed a clear and valid contract. *Sherwin-Williams*, 2015 WL 5500107 at *4. Those allegations are materially different from the issue before the Court. Here, Prime Aid has averred that it relied on a representation made by Express Scripts' agent—an attorney subject to an ethical obligation to be truthful—as to information *solely within Express Scripts' possession*, and not contained in any contract, or other document. (Compl. ¶¶ 60-64, 75, 78-79).[6] In light of these material differences, the Court's holding in *Sherwin-Williams* is not determinative, and must be disregarded.

B. Prime Aid Has Properly Pled A Violation Of The Missouri Prompt Pay Act.

Prime Aid has also sufficiently pled Express Scripts' violation of the MPPA. Missouri courts do not construe the language of "clear and unambiguous statutes." *City of University v.*

[6] Prime Aid notes that Express Scripts' agent, Ms. Hellmann, is a member in good standing of the Missouri Bar. Attorneys in Missouri are subject to Rule 4-4.1: Truthfulness In Statements To Others. This rule provides that, "in the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person." Prime Aid's purpose is *not* to cast aspersions upon Ms. Hellmann's character, or insinuate that she violated her ethical duties. Rather, her obligations absolutely justify Prime Aid's reliance upon her letter.

AT&T Wireless Services, 371 S.W.3d 14, 18 (Mo. Ct. App. 2012); *see also Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo. 1988) (*en banc*) ("[W]here a statute's language is clear and unambiguous, there is no room for construction."). "In determining whether the language is clear and unambiguous, the standard is whether the statute's terms are plain and clear to one of ordinary intelligence." *Wolff Shoe Co.*, 762 S.W.2d at 31. The language of the MPPA could not be more unambiguous. Prime Aid is clearly a qualified claimant as defined by the plain language of the statute.

The MPPA defines a "claimant" as "*any* individual, corporation, association, partnership or other legal entity asserting a right to payment arising out of a contract or a contingence or loss covered under a health benefit plan." Mo. Rev. Stat. § 376.383.1(1) (emphasis added). Prime Aid has averred facts that bring it squarely within the ambit of this definition. Prime Aid has averred that it is a corporation. (Compl. ¶ 13) ("Plaintiff Prime Aid Pharmacy corp. is a New Jersey corporation"). Moreover, Prime Aid has clearly averred that it is asserting a right to payment arising out of a contract with Express Scripts. Specifically, Prime Aid has alleged—and Express Scripts cannot possibly dispute—that Prime Aid and Express Scripts entered into a Provider Agreement wherein Prime Aid agreed to provide pharmacy services to Express Scripts' insureds in exchange for reimbursement by Express Scripts. (Compl. ¶¶ 25-26). Prime Aid has alleged a right to payment: based on documentation provided by Express Scripts itself, there are approximately 104 outstanding claims made by Prime Aid. As to these claims, Express Scripts, has not paid, disputed, or otherwise provided information. (Compl. ¶¶ 104, 106-07; Compl. Ex. J). Prime Aid satisfies the definition of "claimant" under the MPPA. It is entitled to invoke its protections.

Express Scripts would have this Court find that the "clear intent" of the MPPA is to limit the statute's applicability to Missouri-based entities. (Def.'s Mem. Supp. Mot. Dismiss at 6-7). This argument is devoid of both a legal and/or factual basis. As a legal matter, Express Scripts offers no support for the Court to find the MPPA inapplicable to the instant case. The self-serving political statements of the Missouri governor are irrelevant to legal discussion. *See Wolff*, 288 762 S.W.2d at 31 ("[W]here a statute's language is clear and unambiguous, there is no room for construction."). Neither a governor nor the facts can rescue Express Scripts. Prime Aid is a duly licensed Missouri pharmacy doing business in the state. Thus, even if the MPPA was limited to Missouri entities, Express Scripts has no argument. In short, Express Scripts' attempt to limit the protections of MPPA beyond recognition must be denied.

C. Prime Aid's Claim For An Equitable Accounting Properly Pleads The Existence of A Fiduciary Relationship.

In order to obtain an equitable accounting, a party must properly plead, *inter alia*, the existence of a fiduciary duty. [7] In order to do so, a plaintiff may show five "generally necessary," but not mandatory, elements: (1) subservience based on age, state of health, illiteracy, mental disability, or ignorance; (2) possession of things of value owned by the subservient person but possessed or managed by the dominant party; (3) surrender of independence by the subservient party to the dominant party; (4) habitual manipulation of the actions of the subservient party by the dominant party; and/or (5) the subservient party's placement of trust and confidence in the dominant party. *Bunzl Distribution USA, Inc. v. Schultz*, No. 4:05-cv-605-JCH, 2006 WL 3694634 at * 3 (E.D. Mo. Dec. 13, 2006).

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[7] In its Memorandum, Express Scripts' alleges that Prime Aid's equitable accounting claim must be dismissed because Prime Aid failed to properly plead that there was no adequate remedy at law. However, Express Scripts only mentions this argument in the title of its section, and never again addresses that issue. (*See* Mem. Supp. Mot. Dismiss at 7-9). Therefore, Prime Aid does not respond to this reference in the title.

More specifically, courts in Missouri recognize a fiduciary duty "as a result of the special circumstances of the parties' relationship where one places trust in another so that the latter gains superiority and influence over the former." *A.G. Edwards & Sons, Inc. v. Drew*, 978 S.W.2d 386, 394 (Mo. Ct. App. 1998) (internal citation omitted). This inquiry focuses on the conduct of the alleged fiduciary. *SSM Health Care Corp. v. Repwest Ins. Co.*, No. 4:14-cv-1552-CDP, 2013 WL 5800214 at *2 (E.D. Mo. Nov. 7, 2014) (noting that a fiduciary duty "derives from the conduct or undertaking of the purported fiduciary."). In such cases, "things of value such as land, monies, a business, or other things of value must be possessed or managed by the dominant party." *McDonnell Douglas Corp. v. SCI Technology, Inc.*, 933 F.Supp. 822, 828 (E.D. Mo. 1996) (quoting *Chmieleski v. City Products Corp.*, 660 S.W.2d 275, 293 (Mo. Ct. App. 1983)).

Here, Prime Aid has specifically pled that it relied upon and trusted Express Scripts, and that Express Scripts controlled Prime Aid's money and business. (Compl. ¶¶ 135-36). Prime Aid's dependence on the honesty, as well as the accuracy of Express Scripts' accounting, flowed from the nature of the claims' reimbursement process. Prime Aid has specifically pled that it "submitted thousands of claims to Express Scripts" over the course of the term of the Provider Agreement. (Compl. ¶ 132). Prime Aid has also pled that the sheer volume of claims, coupled with the complexity of the payment system, made it impossible for Prime Aid to determine which amounts and claims were outstanding—and why. (Compl. ¶ 135). Thus,

> Based upon the complexity of Express Scripts' claims process, *Prime Aid relied entirely on Express Scripts to reconcile the claim submitted to Express Scripts.* Express Scripts retained *sole discretion* as to whether to deny or approve a claim; and, in the event of a denial, *Express Scripts' unilaterally maintains a record* of the specific grounds for denial. *It also is in sole possession of records regarding amounts paid and withheld on claims submitted by Prime Aid, and in the event the claims are not paid in full, the specific basis for Express Scripts' withholding of funds.*

(Compl. ¶ 136) (emphasis added). By controlling—and severely curtailing—the flow of information, not only was Express Scripts able to place Prime Aid in a position of informational subservience but, by failing to reimburse Prime Aid, Express Scripts retained exclusive control of funds owed to Prime Aid. (Compl. ¶¶ 135-36; Compl. Ex. J). Therefore, Prime has adequately pled that it was subservient to Express Scripts, surrendered its independence to Express Scripts, and, by necessity, placed special confidence in Express Scripts. By virtue of its absolute control of the claims monitoring/reimbursement process, Express Scripts maintained a course of conduct that created a fiduciary obligation between itself and Prime Aid. As a provider pharmacy, Prime Aid had no choice but to accept the statutory scheme and its subservient role to the PBM.

Express Script again relies on irrelevant case law in a vain attempt to support its motion. It cites *Graham Construction Services, Inc. v. Hammer & Steel, Inc.*, No. 4:11-cv-1316-JCH, 2012 WL 685459 (E.D. Mo. Mar. 2, 2012). (Def.'s Mem. Supp. Mot. Dismiss at 8-9). *Graham* is factually distinguishable from the instant case. In *Graham*, the plaintiff entered into a lease agreement with the defendant for a piece of drilling equipment that eventually malfunctioned. *Graham*, 2012 WL 685459 at * 1. The Court found that there was no fiduciary relationship between the parties because the disputed lease agreement was negotiated at arm's length by sophisticated parties, and thus the plaintiff could not show sufficient subservience. *Id.* at *4. Unlike the plaintiff in *Graham*, Prime Aid has alleged an obviously unequal relationship necessarily created by an unavoidable course of dealing. Express Script dominated Prime Aid by maintaining sole discretion to pay claims, unilaterally maintaining records regarding those claims, and retaining Prime Aid's money by failing to reimburse such claims. Unlike the plaintiff in *Graham*, Prime Aid has stood on equal footing with Express Scripts.

V. CONCLUSION

For the foregoing reasons, Prime Aid respectfully requests that the Court deny Express Scripts' Motion to Dismiss in its entirety.

Respectfully submitted,

Dated: November 3, 2016

DUANE MORRIS LLP

/s/ Jonathan L. Swichar
Michael M. Mustokoff (admitted *pro hac vice*)
Jonathan L. Swichar (admitted *pro hac vice*)
William Shotzbarger (admitted *pro hac vice*)
30 South 17th Street
Philadelphia, PA 19103-4196
Telephone: 215-979-1816
Facsimile: 215-979-1020
JLSwichar@duanemorris.com
MMustokoff@duanemorris.com
WShotzbarger@duanemorris.com

GREENSFELDER, HEMKER & GALE, PC

/s/ David P. Niemeier (with consent)
Kevin F. Hormuth, #48165
David P. Niemeier, #50969
10 South Broadway, Suite 2000
St. Louis, MO 63102
Telephone: 314-241-9090
Facsimile: 314-345-5466
kfh@greensfelder.com
dpn@greensfelder.com

Attorneys for Plaintiff Prime Aid Pharmacy Corp.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of November, 2016, a copy of the foregoing document was served to counsel of record via ECF.

/s/ Jonathan L. Swichar

Jonathan L. Swichar